B. The Rights of the Parties With Respect to Termination.

The Agreement specifically provides, at paragraph 8D, that either party can terminate it without cause at any time, upon 30 days written notice:

> "Either party may terminate the Agreement without cause upon at least thirty (30) days prior written notice to the other party specifying the exact date and time of such termination."

The Agreement also specifically provides, at paragraph 9, that if the Agreement is terminated, MRO will be entitled to continued tariffed transport services, but on different 900 lines.

C. The History of MRO's Bankruptcy Case and the Filing of This Action.

MRO filed its bankruptcy case on November 25, 1992. Subsequently, MRO took no action to seek either assumption or rejection of the Agreement in accordance with the provisions of Bankruptcy Code §365.[3/] In the absence of either assumption or rejection of the Agreement, AT&T was obliged by the automatic stay of bankruptcy to continue performing under the unassumed contract. MRO used this involuntary relationship as a basis

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[3/] Bankruptcy Code §365 provides that an executory contract may either be assumed or rejected by the bankruptcy estate. If the executory contract is rejected by the bankruptcy estate, then the estate has no liability under or in connection with the contract. In contrast, if the contract is assumed by the estate, then it becomes fully binding on the estate, which thereafter enjoys all the rights and is subject to all the burdens and responsibilities of the contract.

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for generating numerous claims against AT&T. April 26, 1993, MRO filed this action against AT&T and asserted eight claims for relief, all of which arose out of the relationship under the Agreement.

Later, in or about November 1984, all of MRO's stock was acquired by a company known as Bellatrix International, which is owned and controlled by David Kahn. Mr. Kahn also owns a company known as MC Products, Inc., which is in bankruptcy in Los Angeles, and which has filed several lawsuits against AT&T, including an action currently pending in the Los Angeles District Court. Mr. Kahn acquired MRO for the transparent purpose of expanding his already-existing MC Products litigation against AT&T. Indeed, in February 1995, following Bellatrix' acquisition of MRO, MRO sought and obtained an order authorizing it to file an amended complaint in this action. In contrast to MRO's original simple complaint, the Amended Complaint, which mirrors the MC Products complaint in Los Angeles District Court, asserted twenty-eight claims for relief.

Ultimately, AT&T filed a motion requesting the court to establish a deadline for MRO to formally assume or reject the Agreement. MRO opposed the motion, arguing that AT&T would, upon assumption, exercise its termination rights. The Court granted AT&T's motion, and established a deadline of November 28, 1994.

Thereafter, MRO filed a motion to assume the Agreement, which was heard on February 3, 1995. In connection with its motion, MRO requested that the Court impose various "conditions" upon AT&T, including a requirement that AT&T first obtain court approval prior to exercising its termination rights under the Agreement. The court denied

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MRO's request to impose "conditions" upon the assumption of the Agreement, and only authorized MRO to assume the contract as written.

Thereafter, in April 1995, AT&T filed a motion for relief from the automatic stay, by which it requested that the bankruptcy court vacate the automatic stay of Bankruptcy Code §362 in its entirety as to AT&T so that AT&T could enforce any and all of its contractual or legal rights and remedies under the Agreement and/or the Tariff and/or other applicable state or federal laws. MRO opposed AT&T's motion, again arguing that the bankruptcy court should not grant relief from the automatic stay because AT&T would likely exercise its rights to terminate the Agreement. AT&T's motion was granted at a hearing conducted on May 16, 1995, with the proviso that relief from the automatic stay would not be effective until 10 days after entry of the Court's order. However, an order was not entered until June 30, 1995. Therefore, AT&T has only been authorized to exercise its rights and remedies, including its termination remedies, since July 10, 1995.

IV

MRO IS NOT ENTITLED TO AN ORDER RESTRAINING AT&T FROM TERMINATING ITS CONTRACTUAL RELATIONSHIP WITH MRO.

A. MRO Has Not Requested and Is Not Entitled to a Preliminary Injunction.

Nowhere in MRO's motion does MRO request that the court issue an injunction precluding AT&T from exercising its contractual right to terminate the Billing Services Agreement. However, following service of its Motion on AT&T, MRO orally

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requested such relief at the hearing on the temporary restraining order, and later served an Amended Notice of Motion which stated that MRO was seeking such additional relief. MRO's moving papers do not request that relief, and AT&T will object to any effort by MRO to belatedly "supplement" its papers in that regard.

Notwithstanding the foregoing, it is clear that when the standards for the issuance of a preliminary injunction (discussed in Section VA. below) are applied to the facts of this case, MRO is not entitled to an order restraining AT&T from exercising its right to terminate the Billing Services Agreement and billing services under it. First, MRO has not submitted any evidence demonstrating that it would suffer any irreparable harm. To the contrary, in its moving papers MRO concedes that it does not require AT&T's billing services to survive. [Motion, page 20, lines 9-10] Additionally, as explained in detail below, MRO has not shown any likelihood that it will prevail with respect to its arguments that AT&T is required to provide billing services under the Federal Communications Act. Further, MRO has submitted no evidence showing that the balance of potential harm tips in its favor. Therefore, under either the traditional or the "alternative" injunction standards, MRO is not entitled to a preliminary injunction.

B. The Billing Services Agreement is Not Subject to the Jurisdiction of Title II of the Federal Communications Act.

In its moving papers, MRO argues that AT&T is required under Title II of the Federal Communications Act (the "FCA") to continue providing the contractually-based billing services called for under the Agreement in perpetuity, notwithstanding the fact that the

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Agreement specifically grants both parties the right to terminate the Agreement without cause upon 30 days written notice. MRO's arguments are totally unsupported by applicable law. AT&T's provision of billing services under the Agreement is exclusively a matter of contract, and is simply not within the jurisdiction of the FCA.

The FCA (Title 47 of the United States Code) is comprised of three titles. Title I, consisting of sections 151-155, sets forth the general provisions of the Act. Title II, consisting of sections 201-222, gives the FCC authority over common carrier interstate or foreign communication by wire or radio. The FCC has the power under Title II of the FCA to adjudge the lawfulness of proposed common carrier charges, classifications, regulations, and practices, and if it finds them unlawful to prescribe just and reasonable ones. Title III provides for the regulation of broadcasting

In its moving papers, MRO argues that AT&T is required under Title II of the FCA to continue providing the unregulated contractually-based billing services called for under the Agreement. MRO makes specific reference to section 202(a) of the FCA, which states the following:

> "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations facilities, or services for or in connection with like communication service, directly or indirectly . . . ."

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MRO argues that AT&T's prospective termination of billing services under the Agreement is an "unjust or unreasonable discrimination" prohibited under section 202(a). However, MRO's interpretation is contrary to established law.

As a threshold matter, Title II and the provisions contained therein apply exclusively to "common carrier services". It is established that the billing services provided by companies such as AT&T to 900 number pay-per-call business such as MRO are not common carrier services subject to the jurisdiction of Title II of the FCA. In In the Matter of Audio Communications, Inc. Petition for a Declaratory Ruling, etc., 8 FCC Rcd 8697 (1993), the FCC issued a ruling on this specific issue. For the court's convenience, a copy of this ruling is attached hereto.

In the Audio Communications matter, the FCC was asked to determine whether Sprint Telemedia's decision to cease providing 900 number billing services violated Title II of the FCA. In ruling that there was no violation, the FCC reaffirmed that the applicability of Title II depended upon whether or not Sprint's billing services were being offered as a common carrier service. The FCC ruled that the billing services provided by interexchange carriers such as Sprint (and AT&T) are not common carrier services and are therefore not subject to the jurisdiction of Title II of the FCA.

Prior to the issuance of the Audio Communications decision, the FCC had made a similar ruling in AT&T 900 Dial-It Services and Third Party Billing and Collection Services, FCC Rcd No. 9, 3429 (1989). That decision involved the question of whether or not the billing services provided by AT&T in connection with its dial-it 900 services were

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common carrier services subject to the jurisdiction of Title II of the FCA.[4/]. In the Dial-It matter, as in Audio Communications, the FCC ruled that AT&T's billing services did not constitute an interstate common carrier communications service subject to Title II of the FCA, noting that "the provision of such services is subject to competition or the likelihood of competition." Id. at paragraph 33.

In the Audio Communications decision, the FCC determined that the billing services provided in connection with 900-number pay-per-call businesses was susceptible to even greater competition than the FCC had found in the Dial-It case, stating the following:

> "Under these circumstances, we conclude that the billing and collection services provided by IXC's [Interexchange Carriers] for IP's [Information Providers] is subject to even more competition than the billing and collection services provided by LEC's [Local Exchange Companies] in the Detariffing Order and by AT&T in the AT&T Dial-It Order and thus there is even less reason to treat it as common carriage." Id. at paragraph 22.

In its moving papers, MRO does not make any reference to the Audio Communications decision, and urges the court to disregard the Dial-It decision. In that

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[4/] AT&T's dial-it 900 service is a telecommunications service which permits simultaneous calling by a large number of callers nationwide to a single telephone number, and is often used by entrepreneurs for various mass marketing, informational and promotional services such as preference polling and current news or sports results.

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regard, MRO asserts that the Dial-It decision is of no relevance because in that case there was no allegation that AT&T's billing services were "tied" to its tariffed transport services, as alleged in this case. MRO cites to the Ninth Circuit's decision in People of California v. FCC, 905 F.2d 1217 (9th Cir. 1990) and National Association of Reg. Utility Comm. ("NARUC") v. FCC, 880 F.2d 422 (DC Cir. 1989), arguing that it does not matter whether AT&T's billing services are of a "common carrier services" nature or not, because FCA section 202(a) prohibits unreasonable discrimination against "practices . . . in connection with like communication."

However, MRO's argument was specifically addressed and rejected by the FCC in the Audio Communications decision:

> "ACI also argues that Title II would apply here even if billing and collection is not a common carrier service, because section 202(a)'s prohibition against unreasonable discrimination applies to 'practices . . . in connection with like communication." ACI states that this provision should be read to apply to incidental communications services that are bundled with common carrier services even if the incidental services are not themselves, common carrier services. ACI claims that California v. FCC, 905 F.2d 1217 (9th Cir. 1990) and NARUC v. FCC, 880 F.2d 422 (DC Cir. 1989) both support its position that section 202(a) does not require the incidental services to be common carrier services. We disagree. While the decisions cited by ACI deal

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with section 2(b)(1) [152(b)(1)] of the Communications Act,

> which uses language very similar to section 202(a), the legislative history and related context of 2(b)(1) are very different and inapposite to section 202(a). As the Ninth Circuit noted, '[s]ection II(b)(1) [47 U S.C. §152(b)(1) is phrased in broad terms that sweep beyond Title II.' 905 F.2d at 1241 n. 35. Section 202(a) does not have a similarly broad sweep. Id. at paragraph 2, n. 18.

The same issue was considered by the Tenth Circuit in Mical Communications v. Sprint Telemedia, 1 F.3d 1031 (10th Cir 1993), which is cited by MRO in its moving papers In that case, an information provider, Mical, argued that 900 service had always been offered and provided as a bundle package of transmission service plus billing and collection by the common carrier, and that therefore billing and collection services were clearly "in connection with" a communications service under the FCA. Like MRO, Mical cited the California v. FCC and the NARUC v. FCC decisions in support of its argument. Like the FCC, the Tenth Circuit rejected that argument:

> Sprint argues that the few cases upon which Mical relies in support of its argument are distinguishable. We agree. Both [California v. FCC] and [NARUC v. FCC] involved the scope of 47 U.S.C. section 152(b)(1) of Title I of the Communications Act, not Title II, 47 U.S.C. §§ 201-202. In particular, both involved the issue of whether the FCC could preempt state

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> regulation of a particular intrastate service where it had held that interstate provision of the service was beyond the scope of Title II of the Act. . . . As acknowledged by the court in California v. FCC, '[s]ection 2(b)(1) is phrased in broad terms that sweep beyond Title II.' The particular statutory language cannot be read out of context within that broadly worded provision. The identity of language between section 152(b)(1) and section 202(a) does not necessarily mean that the scope of each should be identical.
>
> Finally, none of these cases resolve the precise issue here -- whether Sprints' billing and collection for its 900 area code customers is a service in connection with a communications service under section 202. Id. at 1036, 1037, n. 3. (Emphasis in original.)

Therefore, in the final analysis, MRO's attempt to argue that the contractual billing services provided by AT&T under the Agreement are somehow "common carrier services" subject to the jurisdiction of the FCA is simply wrong, and there is no basis for MRO's argument that AT&T is required to continue providing billing services in perpetuity, notwithstanding the clear language of the termination provisions under the Agreement.

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V

MRO IS NOT ENTITLED TO AN ORDER REQUIRING AT&T TO CONTINUE PROVIDING TRANSPORT SERVICES ON THE EXISTING 900 NUMBERS.

A. Injunction Standards.

The standards and criteria to be evaluated by the Court in considering whether to grant a preliminary injunction are well-established in the Ninth Circuit. Traditionally, a preliminary injunction may be issued if the Court determines: (1) that the moving party will suffer irreparable injury if relief is denied; (2) the moving party will probably prevail on the merits of the action; (3) the balance of potential harm favors the moving party; and, depending on the nature of the case, (4) the public interest favors granting relief. International Jensen v. Metrosound USA, 4 F 3d 819 (9th Cir. 1993).

The Ninth Circuit has also adopted an "alternative standard" under which the moving party may meet its burden by demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor. It has been held that the alterative standards "are not separate tests but the outer reaches of a single continuum." See Regents of the University of California v. American Broadcasting Companies, 747 F.2d 511, 515 (9th Cir. 1984); International Jensen, supra at 822.

B. MRO has not Demonstrated Any Irreparable Harm.

The only "evidence" that MRO has submitted on the issue of irreparable harm is the self-serving, argumentative, and otherwise inadmissible testimony of MRO's principal, David Kahn.[5/] Apart from Mr. Kahn's incompetent testimony, nothing has been presented to the court which establishes that MRO will suffer any damage at all, let alone irreparable damage.

Even if it is assumed for the sake of argument that MRO would suffer damage as a result of the reassignment of 900 numbers, and further assuming that AT&T were liable to MRO for any such damage, there is nothing that points to MRO's supposed damages as being "irreparable".[6/] To the contrary, it is clear that any damage that MRO might suffer would be fully compensable in money. MRO states that if its business were "destroyed" it would cause immediate cessation of more than $130,000 per month in gross revenue. This clearly indicates that MRO's supposed damages would be ascertainable and compensable in money damages. In a case of much more potentially significant damages and harm, the Ninth Circuit expressly stated that lost revenues do not constitute cause for the issuance of a

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[5/] Virtually every line of Mr. Kahn's affidavit is objectionable and inadmissible in evidence. Accordingly, AT&T has prepared comprehensive Evidentiary Objections to Mr. Kahn's affidavit, and requests that the Court rule on the Evidentiary Objections at or prior to the hearing on MRO's Motion.

[6/] In its moving papers, MRO states that courts have "uniformly held" that customer lists are unique property for which money damages are not an adequate remedy. However, MRO does not cite to any case authority in that regard, and makes reference only to an article in American Jurisprudence and a paragraph in the Restatement of Torts. Those references are totally inapplicable in this case, since they deal only with situations in which injunctions may be issued to preclude a former employee of a business from stealing the business's secret customer list, which is cloaked with various trade secret privileges.

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preliminary injunction. In Los Angeles Memorial Coliseum Comm'n v. NFL, 634 F.2d 1197, 1202 (9th Cir. 1980), the Ninth Circuit reversed the district court because it had proceeded upon the erroneous legal premise that the threatened injury of lost income could support the issuance of a preliminary injunction. In reversing the district court, the Ninth Circuit cited to the Supreme Court case of Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937, 951 (1974), wherein the Supreme Court held that loss of income did not constitute irreparable injury:

> "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Sampson v. Murray, 415 U.S. at 90, 94 S.Ct. at 952.

C. MRO Has Not Demonstrated That it Will Probably Prevail on the Merits in this Action

1. MRO's FCC Arguments are Meritless.

MRO argues that AT&T is prohibited under the provisions of the FCA from assigning new 900 numbers to MRO following the termination of billing services. In making that argument, MRO asks the court to disregard and ignore the clear provisions of the Tariff,

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as well as MRO's specific promise and agreement under the Billing Services Agreement.

Basically, MRO argues that it is "unjust" and "unreasonable" for AT&T to exercise its rights pursuant to the contract of the parties to assign new 900 numbers, arguing that MRO's prior agreement in that regard is unenforceable, and that the provisions of the Tariff which preclude any ownership interest in 900 numbers is similarly of no force or effect. However, MRO does not provide any persuasive authority to support its position, which is grounded upon the theory that MRO holds some sort of "ownership" interest in the 900 numbers in question.

As previously emphasized, the Tariff specifically states: "Nothing herein or elsewhere in this tariff shall give any Customer, Assignee or Transferee any interest or proprietary right to any AT&T MultiQuest service 900 telephone number". FCC Tariff No. 1, section 5.4.2.E The Tariff has the force of federal law, and is well established that a tariff filed with the FCC and permitted to go into effect is binding and conclusive with respect to the rights and liabilities of the carrier and its customer. See AT&T v. Florida-Texas Freight, Inc., 357 F.Supp. 977, 979 (S D. Fla.), aff'd per curiam, 485 F.2d 1390 (5th Cir. 1973). In other words, "a tariff, required by law to be filed, constitutes the law and not merely a contract." Id.; Carter v. AT&T, 365 F.2d 486, 496 (5th Cir. 1966), cert. denied 385 U.S. 1008 (1967).

As a consequence, the "ownership" theories which underlie all of MRO's claims are, on their face, invalid. Similarly, MRO is estopped from asserting that the provisions of the Tariff which preclude ownership of 900 numbers is "unjust" or "unreasonable". When MRO entered into the Billing Services Agreement with AT&T, and

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thereby established the course of dealing and relationship which is the basis of this action, MRO specifically agreed that either party could terminate the contractual relationship without cause upon 30 days written notice, and that upon termination of the Billing Services Agreement, MRO would not retain any 900 numbers that had previously been assigned, and would be assigned new numbers if it wished continued 900 number service. MRO is estopped from asserting a contrary position and interpretation of the Tariff years later, after the parties have conducted business in accordance with the terms of the Billing Services Agreement.

2. MRO's Antitrust Claims are Meritless.

In its moving papers, MRO asserts that any termination by AT&T of transport service on the existing 900 telephone numbers is prohibited by virtue of alleged antitrust violations by AT&T. Basically, MRO argues that AT&T employs "illegal tying and exclusive dealing provisions" in the Agreement, and that those supposedly illegal provisions deny MRO essential services under the 'essential facility doctrine". MRO's antitrust arguments are totally meritless.

First, there was no unlawful tie-in because the arrangement involved a single product, rather than two separate products. Under applicable law, there can be no unlawful tie-in unless the arrangement involves two separate products. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507 (1969); Times-Picayne Publishing Co. v. United States, 345 U.S. 594, 613-14 (1953); United States v. Gerrold Electronics Corp., 187 F.Supp. 545, 559-60 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961). Whether two

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products are involved depends on whether the arrangement links two distinct product markets that are "distinguishable in the eyes of buyers." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 1921 (1984). MRO is required to identify the products at issue in the tie and demonstrate that "there is sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product]." Service & Training, Inc. v. Data General Corp., 963 F.2d 680, 684 (4th Cir. 1992), quoting Jefferson Parish, 466 U.S. at 21-22.

In this case, the buyers of MultiQuest premium billing services have traditionally purchased billing services in connection with a particular 900 telephone number that utilizes network services. As a practical matter, it is impossible for a supplier of billing services to provide such services without a mechanism to integrate the billing services with the network services. Accordingly, MRO's tie-in claims are inherently flawed because the provision of network services together with billing services constitutes a single product. See Montgomery County Association of Realtors, Inc. v. Realty Photo Master Corp., 1993 U.S. App. Lexis 11771, 1993-1 Trade Cas. (CCH) ¶70, 239 (4TH CIR. 1993), cert. denied, 126 L.Ed.2d 374 (1993). (Photographs and property descriptions in real estate multiple listings service constitute single product).

Further, MRO's claim that AT&T is an essential facility to its 900 telephone number customers is without merit. "Stated most generally, the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to

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compete with the first." Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991), cert. denied, 112 S.Ct. 1603, 118 L.Ed. 2d 316 (1992). In order to prevail on such a claim, the plaintiff must establish "(1) that the defendant is a monopolist in control of the essential facility, (2) that competitors of the monopolist are unable to duplicate the facility, (3) that the monopolist has refused to provide the competitors access to the facility, and (4) that it is feasible for the monopolist to do so." Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976, 983 (9th Cir. 1988).

The essential facility doctrine does not apply in this case for the simple reason that tariffed transport services are available *from* a number of vendors (such as MCI, etc.) and billing services are also available from a number of vendors (including American Telnet and Interactive Telemedia). MRO has at all times been able to subscribe to comparable services from MCI or other competitors of AT&T. See City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992) ("[I]f the facility can be reasonably or practically duplicated it is highly unlikely, even impossible, that it will be found to be essential at all."); Ferguson v. Greater Pocatello Chamber of Commerce, supra, 848 F.2d at 983 (insufficient evidence that facility was essential or that reasonable alternatives were not available to plaintiffs.)

D. MRO has Failed to Demonstrate that the Balance of Hardships Tips in its Favor.

The only "evidence" that MRO has submitted in connection with its motion is the totally incompetent testimony of David Kahn. Apart from argumentative, speculative and self-serving prophecies of doom and gloom, MRO submits no evidence which establishes that

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self-serving prophecies of doom and gloom, MRO submits no evidence which establishes that the balance of hardships tips in its favor. To the contrary, the history of this case demonstrates that the balance of hardships has tipped in favor of AT&T.

While MRO complains that termination of transport services on the existing 900 numbers will destroy its business, MRO has taken no action over the past three years to deal with that perceived problem. There is no indication, for example, that MRO has made any efforts whatsoever to establish a new relationship with another carrier to obtain 900 numbers and a new billing services arrangement. Similarly, there is no evidence that MRO has made any attempt to advise its customers, through recorded referral messages on each of MRO's outgoing programs, that after a certain date MRO's programs can be accessed through a new telephone number. Under the circumstances, therefore, MRO cannot claim that the "balance of hardships" tips in its favor at all.

E. MRO Has Not Established An Adequate Showing Under the "Alternative Test" for a Preliminary Injunction.

MRO has also failed to establish that it is entitled to a preliminary injunction under the "alternative test" for the issuance of preliminary injunctions. First, MRO has not presented a convincing "combination of probable success on the merits and the possibility of irreparable harm." As stated above, MRO does not have a likelihood of success on the merits at all, let alone the prospect of a "probable success". Similarly, a stated above, MRO has not demonstrated that it would suffer any irreparable harm. Further, to the extent that MRO has shown the possibility that it may suffer irreparable harm, that showing, in and of

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itself, is insufficient in view of the fact that MRO has not shown a probability of success on the merits. See International Jensen, supra, at 827. Similarly, MRO has not demonstrated the existence of serious questions going to the merits nor, as shown above, that the balance of hardships tips sharply in its favor.

F. MRO is not Entitled to Relief Under Section 406 of the Federal Communications Act.

In its moving papers, MRO cites to section 406 of the FCA, which provides that the district courts may issue writs of mandamus against interexchange carriers to prevent a violation of the provisions of the FCA. MRO argues that such relief may be issued without a showing of irreparable injury, citing to Mical Communications v. Sprint Telemedia, 1 F.3d 1031 (10th Cir. 1993).

MRO's arguments regarding the applicability of section 406 are wholly without merit in this case. The use of section 406 presupposes that there is a violation of the FCA which needs to be addressed. MRO argues that the violation is AT&T's prospective refusal to provide transport services. However, AT&T has never advised that it will refuse to provide transport services to MRO. To the contrary, AT&T has specifically agreed, in the Agreement, to provide continued transport services to MRO following any termination of the Agreement, with the proviso that new 900 numbers will be assigned. Assigning new 900 numbers is different than denying transport services, and there is no provision of the FCA nor any other applicable law relating thereto which establishes that MRO is entitled to retain the use of specific 900 numbers. In other words, there is nothing in MRO's motion which

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even remotely demonstrates that the assignment of new 900 numbers in place of previously assigned ones is a violation of the FCA.

In Mical, the Court established that in order to obtain the mandamus relief accorded under section 406, a duty under the FCA would have to be clear and unequivocal:

> "As this court has observed, '[f]or mandamus to issue, there must be a clear right to the relief sought, a plainly defined and preemptory duty . . . to do the action in question; and no other adequate remedy available" Id. at 1036.

The Mical court went on to examine the question of whether, in the context of that case, Sprint's denial of billing services to Mical constituted a violation of the FCA. (Mical had appealed from the district court's refusal to issue a preliminary injunction against Sprint). The Court of Appeals opted to remand the case to district court with instructions to stay the action pending the issuance of a dispositive ruling by the FCC regarding the specific issue of whether or not billing services performed in connection with 900 number pay-per-call businesses were common carrier services subject to the jurisdiction of Title II of the FCA. The Court observed that that very issue was currently pending before the FCC in connection with a petition filed by Audio Communications, Inc. The Court elected to defer to the familiarity and expertise of the FCC regarding that matter, and remanded the action to the district court. As previously discussed, the FCC ultimately decided the issue in the Audio Communications ruling, which was discussed at length hereinabove, and ruled that, the provision of billing services is not a common carrier services and is therefore not subject to the jurisdiction of Title II of the FCA.

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VI

THE COURT SHOULD REQUIRE MRO TO POST A SUBSTANTIAL BOND, TO THE EXTENT THAT ANY INJUNCTIVE RELIEF IS GRANTED.

Although Bankruptcy Rule 7065 permits a debtor to obtain a preliminary injunction without compliance with the bond requirements of Rule 65(c) of the Federal Rules of Civil Procedure, in every case the court must examine the facts and balance the hardships carefully. Bankruptcy Rule 7065 only states that the court "may" issue an injunction without compliance with rule 65(c). Even if the court has the discretion to excuse the bond, it must expressly consider the need for a bond, and its order must set forth the reasons no bond is required. Roth v. Bank of the Commonwealth, 583 F.2d 527, 538 (6th Cir. 1978).

To the extent that the Court grants any of the relief sought by MRO, this court must require a bond sufficient to cover any losses or damages which may be incurred by AT&T, should it turn out that the injunction should not have been granted. Since the law holds that AT&T's damages will be limited to the amount of the bond, if this court does not require the posting of a substantial bond, AT&T will have no remedy to recover any damages caused by the improper issuance of the injunction. Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164 (9th Cir. 1976). AT&T submits that it would be an abuse of discretion to force AT&T, through the issuance of an injunction, to continue doing business with MRO with no recourse whatsoever. AT&T respectfully submits that a bond of not less than $500,000 is appropriate and necessary to protect AT&T from any damages or a loss that it might suffer by reason of the issuance of any injunctive relief. That bond amount is

eminently reasonable in view of MRO's statement that its revenues exceed $130,000 per month. [Motion, page 8.]

VII

CONCLUSION

By reason of all of the foregoing, AT&T requests that the Court deny MRO's motion in its entirety, and grant MRO no relief whatsoever.

Dated: July 27 1995

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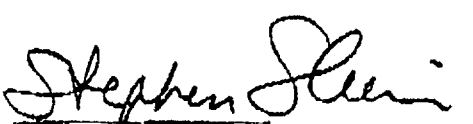
STEPHEN SKACEVIC
LEROY ANDERSON

By: 
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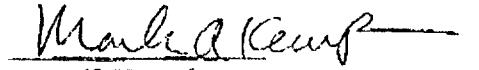
Dated: July 28, 1995

COMPTON & KEMP

By: 
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CERTIFICATE OF MAILING

I hereby certify that service of the foregoing **DEFENDANT AT&T'S OPPOSITION TO MRO'S MOTION FOR PRELIMINARY INJUNCTION** was made on the 28th day of July, 1995, by depositing a true copy of the same for mailing at Las Vegas, Nevada, addressed to:

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DATED this 28th day of July, 1995.

Jackie J. Roselli

JACKIE J. ROSELLI
An Employee of COMPTON & KEMP

EXHIBIT B

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MRO COMMUNICATIONS, INC. a Nevada Corporation, Plaintiff, vs. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendant.	CASE NO. CV-S-95-503-PMP (RLH) BK. Case No. BK-S 92-25253-LBR BK. Adv. No. 932096 **MRO'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR AN ORDER PURSUANT TO SECTION 406 OF THE FEDERAL COMMUNICATIONS ACT, A PRELIMINARY INJUNCTION PURSUANT TO F.R.C.P 65, AND/OR PURSUANT TO THE FEDERAL ANTITRUST LAWS (1) RESTRAINING AT&T FROM TERMINATING MRO'S EXISTING 900 TELEPHONE NUMBERS, AND (2) COMPELLING AT&T TO PROVIDE TARIFFED TRANSPORT AND BILLING AND COLLECTION SERVICES TO MRO (AND/OR TO ITS ASSIGNEE) ON MRO'S EXISTING 900 TELEPHONE NUMBERS.** DATE: September 1, 1995 TIME: 2:30 p.m. CTRM: 2

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